No. 74-1106

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

GREGORY V. WASHINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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CITATIONS

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-16a) is reported at 328 A.2d 98. The oral opinion of the superior court (App. C, *infra*, pp. 19a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 17a-18a) was entered on November 6, 1974. On January 28, 1975, the Chief Justice extended the time within which to file a petition for

a writ of certiorari to and including March 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether a "putative defendant" called as a grand jury witness is entitled to be warned prior to testifying that he is suspected of having committed the substantive offense.

2. Whether, if a warning of some sort is required, it must be administered outside the presence of the grand jury.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

On the night of December 3, 1972, an officer of the Washington, D.C. police department stopped a van after observing it make a U-turn (Tr. 27).[1] The officer then spotted a motorcycle in the back of the van that was listed as having been recently stolen (Tr. 28). The two persons in the van, Samuel Zimmerman and Rueben Woodard, were thereupon arrested, and the van was impounded.

[1] "Tr." refers to the one-volume transcript of the suppression hearing held on June 29, 1973.

"G. Tr." refers to the transcript of respondent's grand jury testimony, a copy of which has been lodged with the Clerk of this Court.

After ascertaining that respondent owned the van, an investigative officer notified respondent that the van was in the possession of the police department (Tr. 8, 29). Respondent then went to the police department to recover it. He told the police officer on duty that he would not press charges against Zimmerman and Woodard because they were friends of his and had had permission to use the van. He explained the presence of the motorcycle by relating that, while driving his van on the evening in question, he had stopped to offer assistance to a person whose motorcycle had broken down. Shortly after loading the motorcycle in the back of the van, however, the van itself broke down. Respondent then left the owner of the motorcycle with the van and called upon his friends Zimmerman and Woodard to help him (Tr. 12, 16). When he returned to the van, the motorcycle's owner had disappeared, leaving the motorcycle behind. The officer to whom respondent related this story said that he did not believe respondent and would not release the van (Tr. 23).

Respondent then went to the United States Attorney's office to make arrangement for its release (Tr. 36). The Assistant United States Attorney to whom respondent talked similarly did not believe his explanation and, although releasing the van, gave respondent a subpoena to appear before the grand jury (Tr. 37-38, 42).

Respondent appeared before the grand jury on February 5, 1973. Prior to questioning, he was warned as follows (G. Tr. 3-4):

Q. Before I ask you any questions I have to tell you what your rights are. I'd like you to listen carefully and I'm going to ask you some questions about your rights afterwards.

You are not under arrest. You're just here by way of subpoena.

Before I, or anybody else in the Grand Jury, ask you any questions you must understand what your rights are.

You have a right to remain silent. You are not required to say anything to us in this Grand Jury at any time or to answer any questions.

Anything you say can be used against you in Court.

You have the right to talk to a lawyer for advice before we question you and have him outside the Grand Jury during any questioning.

If you cannot afford a lawyer and want one a lawyer will be provided for you.

If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time.

You also have the right to stop answering at any time until you talk to a lawyer.

Now, do you understand those rights, sir?

A. Yes, I do.

Q. And do you want to answer questions of the Grand Jury in reference to a stolen motorcycle that was found in your truck?

A. Yes, sir

Q. And do you want a lawyer here or outside the Grand Jury room while you answer those questions?

A. No, I don't think so.

Respondent was then shown a form containing *Miranda* warnings and an agreement to waive the Fifth Amendment privilege. He read the form and then signed the waiver (G. Tr. 3-4).[2] Respondent was then questioned about his knowledge of the motorcycle theft. He related in detail the same story he had told the authorities twice before (G. Tr. 4-28).

The grand jury thereafter indicted respondent, Zimmerman and Woodard for grand larceny (22 D.C. Code 2201) and receiving stolen property (22 D.C. Code 2205).

2. Respondent moved to quash the indictment on the ground that it was based on grand jury testimony that had been obtained in violation of his Fifth Amendment rights. After a suppression hearing, the Superior Court for the District of Columbia held that the warnings given respondent were inadequate (App. C, *infra*, p. 19a) in that, because respondent was a suspect when he appeared before the grand jury, an inquiry should have been made "to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences

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[2] This was the same form used by the Metropolitan Police Department prior to custodial questioning (Tr. 62).

of what might result in the event that he does waive his constitutional right and in the event that he does make incriminating statements" (App. C, *infra*, p. 20a). Respondent should have been warned, according to the court, that his testimony could result in his indictment by the grand jury before which he was testifying, that thereafter he could be required to stand trial in a criminal court on prosecution for a criminal offense, and that statements made before the grand jury could be used against him at such trial (App. C, *infra*, p. 20a). The superior court therefore suppressed respondent's grand jury testimony and dismissed the indictment against him.

The District of Columbia Court of Appeals sustained the suppression order of the superior court but reversed the dismissal of the indictment (App. A, *infra*, p. 13a). As reasons for sustaining the suppression order, the court pointed to the fact that the prosecutor had failed to inform respondent that he was a potential defendant when he appeared before the grand jury (App. A, *infra*, p. 3a) and had waited "until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given" (*ibid.*).

REASONS FOR GRANTING THE WRIT

This case presents a question closely related to those that underlie our pending petitions for certiorari to review the decisions of the Ninth Circuit in *United States* v. *Wong*, No. 74-1636, decided September 23, 1974 (Sup. Ct. No. 74-635), and the Fifth

Circuit in *United States* v. *Mandujano*, 496 F.2d 1050 (Sup. Ct. No. 74-754), and over which the circuits are in conflict: the extent to which (if at all) a grand jury witness suspected of involvement in criminal activity must, prior to testifying, be advised of his Fifth Amendment privilege against self-incrimination.[3] Here, in providing respondent with complete *Miranda* warnings prior to questioning him, the prosecutor took all the precautions required by *Mandujano* and *Wong* to assure voluntariness—precautions which, we submit, are not constitutionally required. Nevertheless, the District of Columbia Court of Appeals ruled that the respondent's subsequent testimony should be suppressed because the prosecution failed to provide him with two additional constitutional entitlements: (1) a warning that he was a "putative defendant" whom the grand jury might indict; and (2) administration of these warnings outside the presence of the grand jury.[4]

In requiring that a so-called "putative defendant" be given, outside the presence of the grand jury, complete *Miranda* warnings *plus* a warning that he is considered to be a potential defendant, the court in the instant case unjustifiably impeded the investigative power of the grand jury, which "must be broad if its public responsibility is adequately to be dis-

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[3] We are sending copies of our petitions in *Wong* and *Mandujano* to counsel for respondent.

[4] As the court made clear, its holding was based on federal grounds, not on local evidentiary law (App. A, *infra*, p. 6a): "[A]ppellee's testimony before the grand jury was tainted for it is the immediate product of *constitutional* violation" (emphasis supplied).

charged." *United States* v. *Calandra*, 414 U.S. 338, 344. It also adopted an unduly expansive notion of the content of the self-incrimination provision of the Fifth Amendment, which does not require the giving of a warning appropriate to police interrogation in the grand jury context and does not, any more than *Miranda* itself, require telling a "putative defendant" that he is suspected of committing the substantive offense. The decision subverts the policy of the Fifth Amendment against compulsion and transmutes it into a general policy to discourage admissions or statements of any kind to grand juries.

1. Although there is considerable overlap between this case, on the one hand, and *Mandujano* and *Wong*, on the other, there are also significant differences that make it important for this Court to review the decision in this case in order to resolve the burgeoning uncertainties that surround the question of the responsibilities of the government in providing warnings to grand jury witnesses and the consequences of any failure by the government to comply with such requirements as may be recognized. Both *Mandujano* and *Wong* were perjury prosecutions, and the resolution of those cases might well turn on special policies applicable to that crime. See *United States* v. *Knox*, 396 U.S. 77; *Bryson* v. *United States*, 396 U.S. 64; *Glickstein* v. *United States*, 222 U.S. 139. Respondent has not been accused of perjury, so that suppression of his testimony in a prosecution for the substantive offense to which it related is a more

appropriate remedy (*if* that testimony was obtained in violation of his privilege against compelled self-incrimination). The instant case also usefully complements *Mandujano* and *Wong* in that, as outlined above, it imposes significant additional requirements on the government.

2. Whatever may be the desirable practice, we do not believe that a grand jury witness—even a so-called "putative defendant"—is *constitutionally* entitled to be apprised of his privilege against self-incrimination, let alone to receive complete *Miranda* warnings.[5] The reasons for this position are set forth in our petition in *Mandujano* (Pet. No. 74-754, pp. 8-12) and will not be reiterated here.

Even if our position on that question is rejected, the decision in the instant case goes far further—and with even less justification—by holding *Miranda*-type warnings insufficient and requiring an additional warning of the witness's status as a potential defendant. This requirement is far removed from the governmental obligation under the self-incrimination clause of the Fifth Amendment to guard against compulsion of self-incriminating statements. Clearly, a grand jury setting is no *more* coercive than police custody, where no such additional warning is re-

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[5] It is our view that the warnings given to respondent prior to his testimony (see pp. 4-5, *supra*) reflected an inappropriate overstatement of his rights insofar as he was told he had an absolute right to remain silent as to any and all grand jury questions. A witness has no such right absent a proper invocation of a testimonial privilege.

quired.[6] Moreover, the requirement raises a host of problems for both prosecutors and courts because, among other things, of the difficulties of identifying who is a "putative defendant." See *United States* v. *Binder*, 453 F.2d 805 (C.A. 2), certiorari denied, 407 U.S. 920. If the attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness, important testimony may be suppressed although voluntarily given, as here. Conversely, the ordinary witness given both *Miranda* warnings and a warning that he is a "putative defendant" (because of the fear that he may later be held by a court to have been a "putative defendant") may be discouraged from providing useful or needed evidence for the grand jury.

In sum, the court's blanket requirement that, prior to testifying, every "putative defendant" be given *Miranda* warnings and a warning that he is suspected of committing the substantive offense would not, we submit, assure the voluntariness of subsequent responses so much as it would tend to discourage the witness from making any responses at all and thereby deter the cooperation that is necessary for the grand jury to determine whether criminal

[6] Of those courts that have required some form of Fifth Amendment warning, none has held that a "putative defendant" is also constitutionally entitled to a warning that he is a suspect. *Mandujano, supra*, 496 F.2d at 1055, and *United States* v. *Rangel*, 496 F.2d 1059, 1062 (C.A. 5), hold that a "putative defendant" must be given *Miranda* warnings; *Wong, supra*, slip op. 4, holds that he must be given an "effective warning of the right to remain silent."

proceedings should be instituted against any person. The requirement would place an unwarranted stumbling block in the way of the grand jury's investigation, turning upon difficult forecasts about who is apt to be indicted. But as this Court stated in *Blair* v. *United States*, 250 U.S. 273, 282, "the scope of [the grand jury's] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."

3. Even assuming that a so-called "putative defendant" is constitutionally entitled to some Fifth Amendment warning prior to testifying before a grand jury, we find no justification (nor did the court below iterate any basis) for requiring that it be administered outside the presence of the grand jury.[7]

Such a requirement is patently unnecessary, since whatever warning is required can be as effectively administered before the grand jury immediately preceding questioning as prior to that time. Indeed, the latter warning, when the witness must actually decide whether to invoke his privilege or answer questions, is apt to be *more* effective in apprising him of his rights (assuming that such apprisal is necessary) than a warning at an earlier juncture. Moreover, the presence of 23 grand jurors may serve to assure

[7] The only other court to have considered this precise issue has held, to the contrary, that warnings need not be administered outside the presence of the grand jury. *United States* v. *Friedman*, 445 F.2d 1076 (C.A. 9), certiorari denied, *sub nom. Jacobs* v. *United States*, 404 U.S. 958.

that the warning is administered carefully, with proper attention to the witness's apparent comprehension. It may also aid the grand jury in ascertaining the voluntariness of subsequent responses and weighing them accordingly. And, as part of the record of the grand jury proceedings, the warning may be conveniently reviewed for its completeness.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MARCH 1975.

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7609

UNITED STATES, APPELLANT

v.

GREGORY V. WASHINGTON, APPELLEE

Appeal from the Superior Court of the District of Columbia

(Argued April 8, 1974 Decided November 6, 1974)

Harry R. Benner, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, *John A. Terry* and *Richard L. Beizer*, Assistant United States Attorneys, were on the brief, for appellant.

Frederick H. Weisberg for appellee.

Before Kern, Nebeker and Pair,* Associate Judges.

NEBEKER, *Associate Judge*: In this government appeal [1] from an order suppressing the accused's grand jury testimony and dismissing the indictment, we asked to hold that a valid waiver of rights was made and, in any event, that the indictment should not have been dismissed. We sustain the suppression order insofar as it has operation at a future trial.

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* Retired as of April 14, 1974.

[1] D.C. Code 1973, § 23-104(c).

which we make possible by reversing the order of dismissal.

Appellee was handed a subpoena to appear before the grand jury when he came to the office of the United States Attorney seeking a property release of his truck. The truck, described as a "van", had been impounded by police officers when it was found disabled on a street. At the time it was occupied by two other persons. The officers observed a motorcycle in the cargo area of the van. It was then learned that the motorcycle had recently been stolen. As a result, the occupants of the van were arrested and both vehicles were impounded. Ownership of the van was discovered to be in appellee. A few days later, after a message had been left at his home by an investigating officer, appellee went to the Metropolitan Police Department, Auto Theft Section, to recover his van. His explanation of how the motorcycle came to be in the van, and the van to be in the possession of its then-occupants, was that he had picked up a "hippy" who loaded the disabled cycle in the van. Later, when the van broke down and appellee went for help, the "hippy" left never to be heard from. The two who were arrested, according to appellee, were his friends who responded to his call for help. The police officers reasonably considered appellee's explanation to be so farfetched that he became a suspect. The van was not released to appellee by the Auto Theft Section, so he then went to the United States Attorney's office seeking a release. An Assistant United States Attorney likewise did not

believe appellee's explanation, and, although he did release the van, he handed appellee the subpoena believing he would not otherwise return to testify. Appellee was considered to be a potential defendant.

At no time was appellee told that he was considered a potential defendant in a prosecution connected with the theft of the motorcycle. Indeed, he was only told that he was needed as a witness in prosecuting the two who were occupants of the van at the time of its impoundment. When appellee appeared pursuant to the subpoena, he was taken before the grand jury without being apprised of his rights including the fact that he was considered a potential defendant.

In the presence of the grand jury, appellee was advised of his rights in a manner correctly characterized by the trial court judge as inadequate. The deficiency in that advice arises from failure to maintain a scrupulous concern that waiver must be knowingly and intelligently made.[2] We are in agreement with the trial court judge that the most significant failing of the prosecutor was in not advising appellant that he was a potential defendant. Another shortcoming was in the prosecutor's waiting until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given. This manner of proceeding is specifically condemned by Standard 3.6(d) of the ABA

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[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). *Cf. Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function*, which states:

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

The order, insofar as it suppressed appellee's grand jury testimony as trial evidence, is therefore affirmed. *Jones* v. *United States*, 119 U.S.App.D.C. 284, 290-91, 342 F.2d 863, 869-70 (1964). *See United States* v. *Luxenberg*, 374 F.2d 241, 246 (6th Cir. 1967); *cf. United States* v. *Scully*, 225 F.2d 113 (2d Cir. 1955).

There remains the question whether the effect of the suppression order goes to the validity of the grand jury proceeding and the indictment. At the end of the hearing, the trial court judge stated that he was going to examine the grand jury testimony to "determine whether or not there is sufficient evidence . . . to sustain the indictment independent of this witness' testimony." In his subsequent order, the judge held that "in the absence of this defendant's testimony . . . no competent evidence exists upon which the grand jury could rely in properly returning the trial court viewed the effect of its suppression order as, in contemplation of law, expunging appellee's testimony from the grand jury transcript thereby leaving an inadequate predicate for the indictment. We hold this view of the suppression order to be error

in light of *United States* v. *Blue*, 384 U.S. 251, 255 (1966). There the Court held:

> Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure. . . . Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.[3] [Footnote and citations omitted.]

[3] The fact that the prosecution in *Blue* had been ended and the accused exculpated played no part in the Court's holding "[o]n the merits of the case" (384 U.S. at 254). That factual aspect was critical to the then criminal appeals statute limiting government appeals to decisions "sustaining a motion in bar". *See United States* v. *Blue*, *supra* at 253 n.2. That fact was of jurisdictional significance only since in note 3 (*id.* at 255) the Court said, ". . . our precedents indicate this would not be a basis for abating the prosecution *pending a new indictment*, let alone barring it altogether." (Emphasis supplied.) Thus, the Court expressly went beyond the peculiar jurisdictional facts in *Blue* to make its holding cover cases where a new indictment was possible.

Of more recent date this concept of grand jury function and independence has been even more solidified. *See United States* v. *Calandra*, —— U.S. ——, 94 S.Ct. 613, 619, 623 (1974); *United States* v. *Dionisio*, 410 U.S. 1 (1973). *Calandra* reinforces *Blue* in its holding that evidence suppressible at trial may, in any event, be presented to a grand jury without fatally infecting the indictment.

We recognize that in *Blue* the grand jury was not the site of the constitutional deprivation. This fact does not appear of legal significance, for the Court also addressed that issue by a pointed and significant comment respecting "tainted evidence . . . presented to the grand jury." It was said in *Blue* that in the event such taint be found *in* the grand jury proceeding,

> our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See Costello v. United States, 350 US 359, 100 L ed 397, 76 S Ct 406; Lawn v. United States 355 US 339, 2 L ed 2d 321, 78 S Ct 311; 8 Wigmore, Evidence § 2184a, at 40 (McNaughton rev 1961). [*Id.* at 255 n.3.]

Of course, appellee's testimony before the grand jury was tainted for it is the immediate product of constitutional violation.

Appellee argues that on these facts we should apply the usual review standard when considering discretionary action of the trial court, *i.e.*, abusive exercise. He relies on two cases from this jurisdic-

tion for the proposition that dismissal of an indictment for lack of evidentiary basis is permissible, *Jones* v. *United States*, *supra*, and discretionary, *Carrado* v. *United States*, 93 U.S.App.D.C. 183, 188, 210 F.2d 712, 717 (1953).[4] We observe, first, that *Carrado* was decided in 1953 and since that time the Supreme Court has adopted in numerous cases "a very broad rule relating to the sufficiency of evidence supporting an indictment." *Coppedge* v. *United States*, 114 U.S.App.D.C. 79, 82, 311 F.2d 128, 131 (1962). As Judge (now Chief Justice) Burger observed in *Coppedge*, *Lawn* v. *United States*, 355 U.S. 339 (1958), stood for the often quoted principle that:

> "[A]n indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." [*Coppedge* v. *United States*, *supra* at 82, 311 F.2d at 131.]

Numerous decisions of the Supreme Court before and after *Lawn* attest to the proposition that this principle is not intended to be confined to the particular facts of a given case. *See United States* v. *Calandra*, *supra*; *United States* v. *Dionisio*, *supra*; *United States* v. *Blue*, *supra* at 255 n.3; *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *Holt* v. *United States*,

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[4] Appellee also relies on *Truchinski* v. *United States*, 393 F.2d 627, 632 (8th Cir. 1968); *United States* v. *Tane*, 329 F.2d 848, 853 (2d. Cir. 1964).

218 U.S. 245, 248 (1910). Indeed, *Calandra* holds that "the validity of an indictment is not affected by the character of the evidence considered." *Id.* 94 S.Ct. at 618. Respecting the power of a grand jury to act, it was observed in *Dionisio* that "jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." 410 U.S. at 15.[5] *Lawn* and *Costello*, when read in light of *United States* v. *Dionisio*, *supra* at 17, also forbid "preliminary trial[s] to determine the competency *and adequacy of* the evidence before the grand jury." *Lawn* v. *United States*, *supra* at 349 (emphasis supplied).

> Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. . . . [*United States* v. *Dionisio*, *supra* at 17.]

To permit this indictment to be challenged for inadequate evidence and require the grand jury to recon-

[5] We recognize that *Dionisio* and *Bransburg* v. *Hayes*, 408 U.S. 665, 701 (1972), on which this passage is based, dealt with grand jury investigation and the gathering of evidence. However, as revealed by the reliance on *Costello* v. *United States*, *supra* at 362, in *Branzburg*, it is apparent that the Supreme Court had in mind both the investigatory function and "instituting criminal proceedings . . . . In fact, grand jurors could act on their own knowledge and were free to make their [own] *presentments* or *indictments* on such information as they deemed satisfactory." *Costello* v. *United States*, *supra* at 362 (emphasis supplied).

sider the matter would surely impede and frustrate the administration of the criminal laws.[6]

This body of decisional law has likewise eroded so much of the *Jones* decision (Part VI) as may be read to permit inquiry into the evidentiary basis of the indictment. In any event, it is apparent that the resulting inquiry in *Jones* into the existence of evidence supporting the indictment independent of the accused's grand jury testimony was based on factors making that case quite distinguishable from this one. While a six-judge majority directed such inquiry on remand there was no majority rationale except to use supervisory power because of "extraordinary"

[6] The Advisory Committee Note to Rule 9 of the Proposed Amendments to the Federal Rules of Criminal Procedure, April 23, 1974, is consistent with the foregoing. The proposed amendment contemplates issuance of a summons instead of a warrant upon charge by indictment or information. However, a warrant may issue if "the government presents a valid reason therefor." The Advisory Committee Note states:

> If the government requests a warratn rather than a summons, good practice would obviously require the judge to satisfy himself that there is probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause. [H.R. Doc. No. 93-292, 93d Cong., 2d Sess. 25 (1974).]

This statement is preceded by the familiar axiom: "The indictment itself is sufficient to establish the existence of probable cause." It is thus apparent that the proposed rule does not contemplate overturning such well-established notions respecting an indictment. The proposed rule only permits such an inquiry respecting facts underlying an information.

disregard of Jones' "situation" and "customary practice." This supervisory exercise of power was a "sanction" because Jones, who had been arrested, was brought from jail to reaffirm before the grand jury an earlier illegal confession without notice to his appointed counsel. Although it is doubtful that this court is bound by an earlier ad hoc punitive exercise of supervisory power by the court in *Jones*, this case is factually so different that *Jones* would not control it in any event.

We also observe that appellee's motion to dismiss relied almost exclusively on the following quotation from Judge Edgerton's opinion in *Jones* v. *United States*, *supra* at 292-93, 342 F.2d at 871-72:

> Since an indictment obtained in violation of federal constitutional rights must be dismissed, at least where substantial prejudice resulted, the violations of Short's privilege against self-incrimination and of his right to the assistance of counsel make it necessary to dismiss the indictments against him. *This is quite independent of the fact that his written confessions, which were read to the grand jury, were obtained in violation of the McNabb-Mallory rule.* [Footnote omitted; emphasis supplied.]

The motion stated that the foregoing quotation was a conclusion of "the Court" as to "the proper remedy." The motion was misleading. That portion of the *Jones* opinion from Part V is not a holding or conclusion of the majority, but only a statement subscribed to by the author and three others. As observed, those four judges agreed with two others in Part VI in order

to obtain a majority "in . . . disposing of the dismissal matter". *Id.* at 294, 342 F.2d at 873.[7]

Appellee's assertion (Brief at 34) that the trial court had discretion to dismiss this indictment is too broad. Authority of the trial court to go behind an indictment is quite limited and discretion thereunder must be exercised only in rare instances consistent with recognized independence of a grand jury. An indictment may be dismissed under Federal Rule of Criminal Procedure 6(b) and Superior Court Criminal Rule 6(b) for infirmity in grand jury composition. In the discretionary sphere, an indictment may be dismissed if not speedily presented. *See* FED. R. CRIM. P. 48(b); SUPER. CT. CRIM. R. 48(b). If a variance between the trial proof and the charge becomes apparent the court must look to determine whether the indictment returned is the one voted on the evidence presented. *E.g.*, *United States* v. *McBride*, —— F.2d —— (D.C. Cir., No. 72-1394, May 7, 1974). *See also Gaither* v. *United States*, 134 U.S.App.D.C. 154, 413 F.2d 1061 (1969), where a procedural irregularity in voting the indictment left doubt that the indictment returned was the one intended.

Except in situations as above, the indictment speaks for itself. The Fifth Amendment right not to be

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[7] Even the authority relied on by Judge Edgerton (*Cassell* v. *Texas*, 339 U.S. 282 (1950)) concededly did not support his view that dismissal of the indictment is an accepted remedy. That case dealt with an unconstitutionally constituted grand jury and in such cases the remedy is clear and provided by law. *See* FED. R. CRIM. P. 6(b).

charged but by indictment of a grand jury is not assured by permitting a general inquiry whether a legally sufficient case was presented. That right is not to be indicted for a legally sufficient case, for sufficiency of the evidence is a trial question and not one for pretrial resolution.

We, therefore, are not evaluating trial court action under the familiar but rigid axiom that discretionary action cannot be upset save for an abuse of that discretion. If that standard of review were to be applied we would be obliged to look to all circumstances of the case and decide whether the grand jury should be required to reconsider indicting appellee without his testimony.[8] The issue presented here is whether the grand jury evidence was to be quantitatively viewed without considering appellee's testimony because of the suppression order. *United States* v. *Blue, supra*, answers in the negative and is reinforced by the recent Supreme Court decisions attesting to the nature and independence of federal grand juries. *See United States* v. *Calandra, supra; United States* v. *Dionisio, supra; Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972).[9]

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[8] In that event the grand jury would have substantially the same evidence presented to it.

[9] It would, of course, be a different situation if appellee, before testifying, had instituted proceedings to quash the summons on constitutional grounds, or claim his Fifth and Sixth Amendment rights. *See United States* v. *Calandra, supra,* 94 S.Ct. at 619. This is the thrust of statements from *Calandra* and *Dionisio* on which the dissent places too broad a significance.

The order appealed from is affirmed in part and reversed in part and the case remanded with instructions to reinstate the indictment.

So ordered.

KERN, *Associate Judge*, concurring in part and dissenting in part: Appellee, suspected by police and prosecutor of grand larceny and receiving stolen goods, was haled before the grand jury pursuant to its subpoena. Once he was in the presence of the jurors uncounselled, an Assistant United States Attorney read him the so-called *Miranda* warning from the standard form used routinely by the police department when making arrests. Appellee acknowledged the warning, signed the waiver on the back of the form, proceeded to testify and was thereafter indicted. The trial court found invalid this purported waiver of his right against self-incrimination on the ground that the warning appellee had received was inadequate and therefore his waiver was neither intelligent nor knowing. The majority upholds this finding and I concur.

The trial court, after reading *in camera* all the testimony before the grand jury, also found, and the majority does not disagree, that:

> [I]n the absence of . . . [appellee's] testimony before the Grand Jury, no competent evidence exists upon which the grand jury could rely in properly returning the instant indictment. . . .

The trial court then dismissed the indictment, presumably exercising its discretion in reliance upon the applicable case law in this jurisdiction, *Jones* v. *United States*, 119 U.S.App.D.C. 284, 290-91, 342 F.2d 863, 869-70 (1964). *See also United States* v. *Tane*, 329 F.2d 848, 583 (2d Cir. 1964).

The majority opinion overturns the trial court's dismissal, stating (at 8):

> To permit this indictment to be challenged for *inadequate evidence* and require the grand jury to reconsider the matter would surely impede and frustrate the administration of the criminal laws. (Emphasis added.) (Footnote omitted.)

With all deference, to describe the evidence here merely as "inadequate" is itself inadequate; the evidence was extracted by the grand jury in violation of appellee's Fifth Amendment right. To permit a grand jury to violate appellee's constitutional privilege by first improperly obtaining from him incriminatory evidence *and* then proceeding to indict on that evidence *alone* is scarcely consistent with or conducive to the proper administration of the criminal laws in this jurisdiction.

The cases cited by the majority in concluding that this indictment, which rests *only* upon appellee's testimony to the grand jury, support in my view the trial court's dismissal rather than the majority's conclusion. They reiterate the constraints that exist on actions by the grand jury—that body which the Supreme Court has characterized as "the grand inquest." *Hendricks* v. *United States*, 223 U.S. 178,

184 (1912). Thus, in *United States* v. *Dioniso*, 410 U.S. 1, 11 (1973), the Court stated:

> This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. *The grand jury cannot require a witness to testify against himself* . . . . (Emphasis added.)

In *United States* v. *Calandra*, —— U.S. ——, 94 S. Ct. 613, 619 (1974), the Court pointed out:

> Of course, the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but *it may not itself violate a valid privilege*, whether established by the Constitution, statutes, or the common law. . . . (Emphasis added.) (Footnote omitted.)

In *United States* v. *Blue*, 384 U.S. 251, 254 (1966), upon which the majority lays particular stress, the Supreme Court considered an order by the trial court that, if upheld, would have *ended* the criminal case and exculpated the defendant rather than an order that merely "abate[d] the prosecution on account of some normally curable defect." Here, it is not suggested that the trial court's dismissal in this case, if affirmed, would preclude a new charge and further prosecution of appellee. Also the evidence challenged in *Blue* had not been acquired as a result of the grand jury's *own* action as is the case here.[1]

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[1] The Court in *Blue* stated in dicta that dismissal of the indictment in that case would not have been justified even had the tainted evidence been presented to the indicting grand jury. *United States* v. *Blue*, *supra* at 255 n.3. This is

I view the facts of the instant case as unusual, occurring as the result of an isolated and unlikely-to-be-repeated prosecutorial aberration. Consequently, these unique facts remove this case from the usual rule that an indictment resting upon *some* incompetent evidence cannot be challenged if facially valid. Accordingly, I would affirm the trial court in all respects.

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to me simply a restatement of the accepted rule that an indictment is not invalid because it is based on *some* incompetent evidence. *See Coppedge* v. *United States,* 114 U.S.App. D.C. 79, 311 F.2d 128 (1962). The question here, on the other hand, is whether an indictment may be sustained when it is based *wholly* on illegally obtained evidence. The trial court concluded in the negative and I quite agree.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7609

16947-73-A-B

[Filed Nov. 6, 1974, District of Columbia Court of Appeals, Alexander L. Stern, Clerk]

January Term, 1974

UNITED STATES, APPELLANT

v.

GREGORY V. WASHINGTON, APPELLEE

Appeal from the Superior Court of the District of Columbia, Criminal Division.

BEFORE: Kern, Nebeker and Pair,* Associate Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Superior Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is

ORDERED and ADJUDGED by this Court that the order on appeal herein, insofar as it suppressed

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* Retired as of April 14, 1974.

appellee's grand jury testimony as trial evidence, be, and the same is hereby, affirmed, and it is

FURTHER ORDERED and ADJUDGED that the aforesaid order, insofar as it granted appellee's motion to dismiss the indictment, be, and the same is hereby, reversed and this cause is remanded to the trial court with instructions to reinstate the indictment for the reasons set forth in the opinion filed herein this date.

Per Curiam.

For the Court:

/s/ Alexander L. Stevas
Alexander L. Stevas
Clerk

Dated: Nov. 6, 1974.

Opinion per Associate Judge Frank Q. Nebeker.

Separate opinion per Associate Judge John W. Kern, III, dissenting in part and concurring in part.

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Docket No. 16947-73

UNITED STATES OF AMERICA

vs.

GREGORY V. WASHINGTON, DEFENDANT

SUPPRESSION HEARING

June 29, 1973

Hon. Joseph M. Hannon, presiding

Volume: I
Pages: 70-71

John F. Hronzick
Official Reporter
Civil Division Building
Superior Court,
District of Columbia
Washington, D.C.

* * * *

[70] THE COURT: I hold that the warning that was given by Mr. Shine to this defendant before the Grand Jury is inadequate, and that as the Supreme Court has said, a heavy burden rests on the Government to demonstrate that a defendant knowingly and intelligently waived his privilege against self-incrimination, and that was in *Miranda* v. *Arizona* where the Supreme Court first said that.

I hold that whatever validity that the PD Form 47 has insofar as used by the Metropolitan Police officers, the use of which I do not question, and the validity of which I do not question because it is being used by a police officer on the street under circumstances as to which he has made an arrest, and the Supreme Court has there directed that the warning at that time be given, but I hold that something more, I respectfully say, is required of the United States Attorney's Office with respect to people that they view as suspects that they bring before the Grand Jury.

Now what is at least required in my judgment, and I do not find it in this case, was the requirement that inquiry be made of the suspect to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences of what might result in the event that he does waive his constitu- [71] tional right and in the event that he does make incriminatory statements, to wit, and more specifically, "that it could result in his indictment by this very Grand Jury that you're testifying before and that thereafter you would be required to stand trial in a criminal court on prosecution for a criminal offense and whatever you say here could at that time be used against you," and I find on the basis of this record that there is an abuse of any evidence which would satisfy me that the United States Attorney's Office as distinguished

from a police officer assured that in this case an intelligent and knowing waiver of Fifth Amendment rights was exercised.

Now, there remains still the question of whether or not I should dismiss the indictment. In the absence of knowing what other testimony there was before the Grand Jury, I can't rule on that.

MR. BEIZER: Your Honor, may I continue this then for the Government to present it?

THE COURT: Well, do you have the Grand Jury transcript?

MR. BEIZER: Yes, I have the entire Grand Jury transcript, Your Honor, and I would submit it to you for your consideration.

THE COURT: All right, you submit it in camera and I'll look at it and I'll rule as to whether or not it should be dismissed.

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